Siti Salma bt Yusoff v CIMB Bank Bhd (Tumpuan Auto Sdn Bhd, third party)

HIGH COURT (KUALA LUMPUR) — SUIT NO D-22NCC-431 OF 2011
MOHAMAD ARIFF J
29 FEBRUARY 2012

Hire Purchase — Hire purchase agreement — Validity of — Car hired under agreement had different chassis number from that stated in agreement and car registration card — Whether owner thereby unable to pass good title to vehicle — Whether total failure of consideration — Whether hirer's claim for refund of all monies paid under agreement premature — Whether time to decide owner's ability to pass good title was when hirer had paid all monies due under agreement — Whether hirer had proved claim for defamation for wrongful repossession of car

The plaintiff purchased a new Naza Ria car from the third party under a seven-year hire-purchase facility ('the HP agreement') provided by the defendant. The plaintiff's husband did not check the car's chassis number when he took possession of the car on her behalf from the third party. About five years later the plaintiff discovered that the chassis number on her car was different from that stated in its registration card. The chassis number stated on the registration card belonged to another car of the same make purchased by a person named Dimyati. The plaintiff lodged a police report and complained to the car's dealer ('Naza') about the matter and continued to diligently pay her hire-purchase instalments. Four months later, two agents of the defendant came to her house to repossess the car in full view of her neighbours. The plaintiff and her husband protested and called the police who took the car to the police station where the plaintiff showed the police and the repossessors proof that she had never defaulted in her hire-purchase payments. A representative from Naza also arrived to explain that the problem was due to a mix-up in the registration plate and chassis numbers between the plaintiff's car and Dimyati's. Naza wrote to the Road Transport Department (RTD) requesting it to amend the engine and chassis numbers on both the vehicles concerned but the RTD replied that it could not take any action until Dimyati's car was produced for verification tests. The car that Dimyati bought could not be located. Since her predicament remained unresolved, the plaintiff filed the instant action: (i) for a declaration that the HP agreement was null and void because of the defendant's failure to be able to pass a good title to the vehicle; and (ii) that the defendant refund the total amount she had paid under the HP agreement with interest and pay RM200,000 as damages for defamation for wrongful repossession of the vehicle. The defendant blamed the third party for the discrepancy in the registration of the plaintiff's car. It also

alleged the plaintiff's claim was premature because not only had she not fully settled the hire-purchase loan, the error in the chassis number was also curable. The third party denied it was at fault. It maintained it had followed its standard operating procedures and that it was the plaintiff who should be blamed for not checking the chassis number when taking delivery of the car.

Held, dismissing the claim and ordering each party to bear their own costs:

(1) There was no conclusive proof the defendant was unable to pass a good title. Under s 7(1)(b) of the Hire Purchase Act 1967 the ability to pass a good title must be decided at the time when the plaintiff had paid all sums due under the HP agreement (see para 38).

(2) The instant case was not concerned with a stolen or tampered vehicle. It was a case of an error in the recording of the correct chassis number. No one had tampered with the chassis number. To that extent it could not be said that there had been a total failure of consideration. The plaintiff's claim for full refund was thus not strictly supported in law (see para 43).

(3) The gist of the plaintiff's defamation claim was slander by conduct combined with verbal statements made by the alleged agents of the defendant. Although there was no firm authority on the issue whether there could be slander only by conduct, it was incumbent on the plaintiff to have provided full particulars of claim in compliance with O 78 of the Rules of the High Court 1980. Sufficient particulars of the alleged defamation and the publication of the alleged defamatory statements had to be provided. There was, however, very little by way of necessary particulars or by way of actual evidence to prove the allegations made (see paras 31–32).

(4) It appeared on the probabilities that the error in the recording of the chassis number was the result of human error. It was clear that both the plaintiff and the defendant could not be blamed. The plaintiff's case was unsubstantiated and if allowed would result in her unjust enrichment (see para 37).

(5) The position taken by the RTD that the parties to this action produce Dimyati's vehicle was manifestly unreasonable, unjust and onerous. There was no requirement under the Road Transport Act that imposed such an onerous and near-impossible task upon them. As the relevant parties had informed RTD of the inaccuracy, and there was the report from Puspakom to establish that fact, the RTD was duty-bound to correct the error in accordance with law (see paras 46–47).

[English summary

Plaintif telah membeli kereta baru Naza Ria daripada pihak ketiga di bawah kemudahan sewa beli selama tujuh tahun ('perjanjian SB') yang diberikan oleh

defendan. Suami plaintif tidak memeriksa nombor casis kereta tersebut apabila mengambil milik kereta tersebut bagi pihaknya daripada pihak ketiga. Lebih kurang lima tahun kemudian plaintif mendapati bahawa nombor casis kereta tersebut berbeza daripada yang dinyatakan dalam kad pendaftarannya. Nombor casis pada kad pendaftaran tersebut dimiliki oleh kereta lain yang sama jenis yang telah dibeli oleh seorang bernama Dimyati. Plaintif telah membuat aduan polis dan membuat aduan kepada penjual kereta tersebut (Naza) berhubung perkara itu dan terus membayar dengan teratur ansuran sewa belinya. Empat bulan kemudian, dua orang ejen defendan telah datang ke rumahnya untuk memiliki semula kereta tersebut disaksikan oleh jiran tetangga. Plaintif dan suaminya membantah dan memanggil polis yang telah mengambil kereta tersebut ke balai polis di mana plaintif menunjukkan polis dan pemilik semula bukti bahawa tidak pernah gagal membuat bayaran sewa belinya. Wakil daripada Naza juga tiba di situ untuk menjelaskan bahawa masalahnya adalah disebabkan kekeliruan plat pendaftaran dan nombor-nombor casis antara kereta plaintif dan Dimyati. Naza telah menulis kepada Jabatan Pengangkutan Jalan (JPJ) memintanya untuk meminda enjin dan nombor-nombor casis pada kedua-dua kenderaan berkenaan tetapi JPJ menjawab bahawa ia tidak boleh mengambil apa-apa tindakan sehingga kereta Dimyati diserahkan untuk ujian pengesahan. Kereta yang dibeli Dimyati tidak dapat dikesan. Oleh sebab keadaan sukarnya masih tidak dapat diselesaikan, plaintif telah memfailkan tindakan ini: (i) untuk satu deklarasi bahawa perjanjian SB tersebut adalah terbatal dan tidak sah kerana kegagalan defendan membolehkan penyerahan hak milik yang sah ke atas kenderaan tersebut; dan (ii) bahawa defendan tidak dapat mendapat balik keseluruhan jumlah yang telahpun dibayar olehnya di bawah perjanjian SB tersebut bersama faedah dan membayar RM200,000 sebagai ganti rugi kerana fitnah untuk pemilikan semula yang tidak sah kenderaan tersebut. Defendan menyalahkan pihak ketiga kerana percanggahan dalam pendaftaran kereta plaintif. Adalah juga dikatakan tuntutan plaintif adalah pramatang kerana bukan sahaja dia belum membayar sepenuhnya pinjaman sewa beli itu, kesilapan pada nombor casis juga boleh diperbetulkan. Pihak ketiga menafikan ia bersalah. Ia menegaskan bahawa ia telah mematuhi piawai prosedur operasi dan bahawa plaintif yang patut dipersalahkan kerana tidak memeriksa nombor casis apabila mengambil serahan kereta tersebut.

Diputuskan, menolak tuntutan dan memerintahkan setiap pihak menanggung kos masing-masing:

(1) Tiada bukti konklusif yang defendan tidak dapat menyerahkan hak milik yang sah. Di bawah s 7(1)(b) Akta Sewa Beli 1967 keupayaan untuk menyerahkan hak milik yang sah perlu diputuskan pada masa apabila plaintif telah membayar kesemua jumlah yang perlu dibayar di bawah perjanjian SB tersebut (lihat perenggan 38).

(2) Kes ini bukan kaitan dengan kenderaan yang dicuri atau diubahsuai. Ia

adalah kes kesilapan merekodkan nombor casis yang betul. Tiada sesiapa telah mengubahsuai nombor casis tersebut. Setakat itu tidak boleh dikatakan bahawa wujud kegagalan untuk mempertimbangkan perkara tersebut. Tuntutan plaintif untuk bayaran balik sepenuhnya oleh itu tidak disokong oleh undang-undang sepenuhnya (lihat perenggan 43).

(3) Inti pati tuntutan fitnah plaintif adalah kenyataan secara lisan yang tidak benar melalui perbuatan disertai kenyataan secara lisan yang dibuat oleh ejen-ejen defendan yang dikatakan itu. Walaupun tiada autoriti kukuh berhubung isu sama ada wujud kenyataan secara lisan yang tidak benar dengan hanya melalui perbuatan, adalah kewajipan plaintif mengemukakan butiran penuh tuntutan agar mematuhi A 78 Kaedah-Kaedah Mahkamah Tinggi 1980. Butiran mencukupi mengenai fitnah yang dikatakan itu dan penerbitan kenyataan-kenyataan berunsur fitnah yang dikatakan itu perlu dikemukakan. Namun begitu, hanya sedikit sahaja yang diperoleh melalui butiran perlu atau melalui keterangan sebenar untuk membuktikan pengataan yang telah dibuat tersebut (lihat perenggan 31–32).

(4) Adalah kelihatan atas kebarangkalian bahawa kesilapan dalam merekodkan nombor casis disebabkan oleh kesilapan manusia. Jelas bahawa kedua-dua plaintif dan defendan tidak boleh dipersalahkan. Kes plaintif tidak boleh dikekalkan dan jika dibenarkan akan mengakibatkan dia menikmati pengayaan yang tidak adil (lihat perenggan 37).

(5) Kedudukan yang diambil oleh JPJ di mana pihak-pihak dalam tindakan ini mengemukakan kenderaan Dimyati amat tidak munasabah, tidak adil dan membebankan. Tiada keperluan di bawah Akta Pengangkutan Jalan yang mengenakan tugas yang membebankan dan mustahil ke atas mereka. Oleh sebab pihak-pihak berkaitan telah memaklumkan JPJ berhubung ketidaktepatan itu, dan terdapat laporan daripada Puspakom untuk membuktikan fakta tersebut, JPJ terikat dengan kewajipan tersebut untuk membetulkan kesilapan itu menurut undang-undang (lihat perenggan 46–47).]

Notes

For a case of validity of hire purchase agreement, see 7(2) *Mallal's Digest* (4th Ed, 2011 Reissue) para 4553.

Cases referred to

Affin-ACF Finance Bhd (formerly known as Asia Commercial Finance (M) Bhd) v Phang Ngan Heong (t/a Syarikat Kereta Kwong Yue) [2010] 7 MLJ 561, HC (refd)

AmFinance Bhd v Europemas Automobile Sdn Bhd & Another (Civil Appeal No MT(2) 12B-71 of 2010) unreported, HC (refd)

Lee Chuie Siang v Public Finance Bhd [2006] 5 MLJ 651; [2006] 5 CLJ 652, HC (refd)
Public Bank Bhd v Malayan Banking Bhd & Another (Civil Appeal No 12–02 of 2002), HC (refd)
Public Finance Bhd v Ehwan bin Saring [1996] 1 MLJ 331, HC (refd)
Yeoman Credit Ltd v Apps [1962] 2 QB 508, CA (refd)

Legislation referred to

Contracts Act 1950 ss 57(2), 66
Customs Act 1967 ss 57(2), 135(1)(d)
Hire Purchase Act 1967 ss 7(1), (1)(b), (4), 16 Fourth Schedule
Road Transport Act 1987 ss 12(4), 61, 62
Rules of the High Court 1980 O 78, O 78 rr 2, 3

Rusaimi Halim Zulkifli (Nor Azian with him) (Rusaimi Halim & Associates) for the plaintiff.
K Ganesan (Subashini with him) (Muhammad, Genesan & Nazri) for the defendant.
Shahin Akhtar M Yunus (Shahin Akhtar & Partners) for the third party.

Mohamad Ariff J:

INTRODUCTION

[1] The facts in this dispute, which has been heard as a full trial, are most peculiar and, to the plaintiff, unfortunate. Nevertheless, the primary subject matter is plain. It concerns a hire purchase agreement executed between the plaintiff and the defendant on 13 February 2004. By this hire purchase agreement, the defendant financed and the plaintiff purchased a Naza Ria with Registration No WLN 1274 and supposedly Chassis No MZMUP7523DN004769 (for brevity, hereinafter referred to as '4769'). Or so the plaintiff thought.

[2] The third party in this suit is the car dealer from whom she purchased the vehicle, the company being added as a party on the application of the defendant and from whom the defendant is claiming an indemnity in the event the court should find the defendant liable.

RELEVANT BACKGROUND FACTS

[3] The plaintiff did not herself take physical delivery of the motor vehicle from the third party's premises (a Naza distributor). It was her husband, Encik Shukri, who did so. After what appeared to be a cursory inspection of the

accessories in the car, her husband took physical delivery of the vehicle without opening the bonnet and confirming the chassis number. Nor was the bonnet opened by the company's representative for any internal examination of the engine and chassis number to be done. It was a new motor vehicle. Her husband assumed that all was in order.

[4] There is no dispute that the plaintiff, who on the evidence is a medical officer at the Ampang Puteri Specialist Hospital, was diligently servicing the monthly instalments until several unfortunate events occurred which led her to refuse to pay the remaining three monthly instalments of RM3,918.34. The total hire purchase price was RM109,191.60 with a repayment period of seven years or 84 months with the monthly repayment of RM1,299.90. Thus, on the evidence at trial the plaintiff had paid all but the remaining last three monthly instalments.

EVENTS OF MARCH 2009

[5] The evidence disclosed that on 10 March 2009, whilst the plaintiff was at work, her husband, Encik Shukri, was at home. A mysterious stranger, named Shamsul, appeared at her home. Apparently this stranger had telephoned her to inform that he was acting for another person named Muhamad Dimyati Khalid and that Dimyati had purchased another Naza Ria, Registration No WLD 9918 with Chassis No MZMUP7523D9004780 (hereinafter referred to as '4780'). According to Shamsul, Chassis 4780 belonged to the plaintiff's Naza Ria, whereas Chassis No 4769 belonged to Dimyati's vehicle.

[6] This mysterious stranger, Shamsul, represented to Encik Shukri that he was a relative of Dimyati. According to Encik Shukri, Shamsul appeared to know a fair bit about the plaintiff's loan and the balance due. The plaintiff returned home, her husband inspected the chassis number of the Naza Ria, and sure enough the chassis number was 4780, not 4769.

[7] Perplexed at how this mysterious stranger came to know of the details of her Naza Ria, she lodged a police report on the same day. On the next day, she took the vehicle for inspection at Puspakom to confirm the real identity of her vehicle. The Puspakom report appears as exh P3. The Puspakom report confirmed that the chassis number was 4780. Nevertheless, the plaintiff continued to diligently pay the monthly instalments. She had also approached Naza after this incident with the hope that Naza would settle this problem concerning her vehicle.

EVENTS OF JULY 2009

[8] Sometime in July 2009, another strange event occurred. This time the

plaintiff was at home, resting. She was on leave after having undergone surgery for cancer and was still undergoing chemotherapy at that time. According to her, suddenly two representatives from the defendant appeared at her home to repossess her Naza Ria. These two persons appeared with a tow truck in front of the house. She and her husband tried to prevent them from repossessing the car and told them that this was not the vehicle to be repossessed. The chaotic scene which ensued is best described by referring to her relevant testimony on this, which I reproduce below.

[9] *PW1 (the plaintiff) in examination-in-chief:*

(S:) Soalan 14, apakah tindakan selanjutnya yang Puan lakukan?

(J:) Saya telah menghubungi pihak Naza untuk menyelesaikan masalah kenderaan tersebut.

(S:) Soalan 15, apakah yang berlaku selepas itu?

(J:) Sekitar bulan Julai 2009, semasa saya sedang berada di rumah, bercuti rehat setelah menjalani pembedahan kanser dan masih menjalani kemoterapi, tiba-tiba ada pihak dari wakil Defendan telah datang untuk menarik kenderaan tersebut, sedangkan saya tidak pernah gagal membayar ansuran kenderaan tersebut.

(S:) Soalan 16, dimanakah perkara tersebut berlaku?

(J:) Ianya berlaku di hadapan rumah saya. 2 orang wakil Defendan bersama dengan lori penarik kereta telah cuba menarik kenderaan saya. Saya dan suami telah cuba untuk menghalang mereka dari menarik kenderaan tersebut dan menerangkan bahawa itu bukannya kenderaan yang sepatutnya ditarik. Tetapi mereka berkeras masih ingin menarik kenderaan tersebut.

(S:) Soalan 17, apakah yang berlaku ketika itu?

(J:) Memandangkan situasi agak kecoh, saya telah menyuruh suami saya menelifon pihak polis memandangkan wakil Defendan tersebut masih berdegil untuk menarik kenderaan tersebut.

(S:) Soalan 18, ada orang lain yang melihat perkara tersebut?

(J:) Jiran-jiran di kawasan rumah saya telah keluar dari rumah mereka dan memerhatikan kekecohan yang berlaku semasa saya dan suami menghalang dan menyelesaikan penarikan secara salah kereta saya oleh wakil Defendan.

(S:) Soalan 19, apakah perasaan Puan ketika itu?

(J:) Saya berasa malu apabila jiran-jiran melihat kekecohan yang berlaku akibat penarikan kereta secara salah oleh wakil Defendan di kawasan rumah saya yang memberikan tanggapan seolah-olah saya tidak mampu membayar ansuran bulanan kenderaan tersebut.

(S:) Soalan 20, apakah yang berlaku selepas itu?

(J:) Sepasukan pihak polis telah datang dan seorang Pegawai Polis telah memandu kenderaan tersebut untuk dibawa ke balai polis Ulu Kelang untuk siasatan lanjut.

(S:) Soalan 21, apakah yang berlaku selepas itu?

(J:) Saya dan suami terpaksa mengikuti kenderaan tersebut hingga ke balai polis dan setelah tiba di balai polis, saya dan suami telah menerangkan apa yang berlaku kepada polis dan wakil Defendan tersebut dan menunjukkan dokumen bahawa saya tidak pernah gagal untuk membayar ansuran bulanan kenderaan tersebut tetapi mereka masih berdegil ingin menarik balik kenderaan tersebut.

(S:) Soalan 22, apakah yang berlaku selepas itu?

(J:) Tidak lama kemudian, seorang wakil daripada Naza telah hadir dan menerangkan bahawa punca sebenar ianya berlaku kerana nombor plat dan nombor chassis telah bertukar dengan sebuah lagi kenderaan, WLD 9918. Barulah wakil Defendan tidak jadi menarik balik kenderaan tersebut.

(S:) Soalan 23, selepas kejadian itu, ada tindakan lanjut dari pihak Defendan?

(J:) Saya menerima salinan surat dari pihak Naza bertarikh 14.7.2009 dan 27.7.2010 kepada JPJ untuk menyelesaikan masalah kereta tersebut.

(S:) Soalan 24, selepas surat tersebut ada lagi makluman dari pihak Defendan?

(J:) Saya menerima salinan surat kepada pihak Naza kepada pihak JPJ bertarikh 25.8.2010 yang menyatakan permohonan mereka telah ditolak oleh pihak JPJ.

(S:) Soalan 25, ada apa-apa tindakan selepas itu daripada pihak Defendan?

(J:) Selepas surat itu, saya tidak lagi menerima apa-apa berita selanjutnya dari mana-mana pihak untuk menyelesaikan masalah kenderaan tersebut.

[10] There is no reason to doubt the plaintiff's version of the facts, since it is amply corroborated by PW2 as well as Naza's representative, Mohammad Razila bin Zainal, PKW3. No plausible grounds exist for me to disbelieve the plaintiff or her husband. I have observed their demeanour and considered their personal background, and tested these factors against the contemporaneous documents. The plaintiff is herself a doctor in a well-known specialist hospital while her husband is a building consultant who is also an imam of the couple's local surau. Why should they be taken as narrating otherwise than the truth?

[11] The third party's third witness (Razila) had this to say on the incident:

(S:) En Razila ada apa-apa hendak beritahu ke Mahkamah berkenaan urusan untuk mendapatkan pembetulan.

(J:) Saya Cuma nak tambah satu, bila saya diarahkan ke balai polis pada 3.7 iaitu pada hari jumaat, saya sendiri telah pergi sendiri ke CIMB Jalan P.

Ramlee dan bertemu dengan pegawai-pegawai disana iaitu En Wan, Nazlan dan En Nasiruddin. En Nasiruddin ialah Ketua Bahagian Khidmat Pelanggan dan beliau memberitahu kepada saya yang penarikan kereta ini, dia akan dipastikan tidak akan berlaku lagi. Semasa di balai polis juga, Siva cuma refer pada chassis, pada saya kalau penarikan kereta selalunya kena refer kepada registration dan registration yang saya nampak di atas dokumen tersebut adalah orang lain dan bukan WLN 1274. Saya telah suruh Siva untuk menghubungi pegawai di CIMB dan saya bercakap dengan En Wan.

(S:) Bila kamu berjumpa dengan pihak CIMB?

(J:) Pada 6.7.2009 iaitu Isnin.

(S:) Selepas kejadian di Balai Polis?

(J:) Lepas kejadian pada hari yang sama, pada hari Jumaat saya buat panggilan ke bank untuk buat appointment.

(S:) Bila En Razilan menghubungi bank di balai polis, Siva juga ada bersama?

(J:) Ada.

(S:) Apabila jumpa bank hari isnin tu, apa tujuan?

(J:) Tujuan utama ialah untuk menentukan pihak bank tidak mengganggu lagi pelanggan kami sebab kami menerima panggilan daripada beliau jadi kami membantu sebaik yang mungkin lah. Itu saja tambahan saya.

[12] We also have exh D18 to corroborate the plaintiff's testimony (p 3 of defendant's bundle of documents). This is a letter from Naza Kia Sdn Bhd to 'CIMB Auto Finance, Unit Tarik Kereta'. There is no letter from CIMB Auto Finance denying the contents. I wish to refer in particular to para 2:

Pihak kami ingin megucapkan jutaan terima kasih kepada Encik Wan dari Unit Tarik Kereta dan Encik Nazlan (Pegawai Bertugas) dan Encik Nasiruddin (Ketua Jabatan) dari Unit Khidmat Pelanggan yang telah memberikan kerjasama yang baik di dalam membantu Puan Siti Salma binti Yusoff, pemilik kenderaan WLN 1274 menyelesaikan masalah teknikal yang berlaku terutamanya ketika Encik Shamsul dan Encik Siva dari Unit Tarik Kereta cuba menyita kenderaan beliau pada tarikh 10 Mac 2009 dan 3 Julai 2009 yang lalu.

[13] It is interesting that the contents mention two names expressly: 'Shamsul' and 'Siva'. The attempts by the defendant's sole witness (DW1) to deny knowledge of their existence, with respect, fall flat against this evidence.

[14] In such circumstances, the plight of the plaintiff in this dispute deserves sympathy, and it is, I feel, most unreasonable for the defendant's witness to simply deny knowledge that there was this attempt to repossess the car by these two car re-possessors. The same can be said for the insinuation made by the

third party's first witness (PKW1), Syed Abdul Nasir, who appeared adamant that his company could not have been at fault:

> (S:) Kereta WLD9918 dikeluarkan oleh syarikat kamu. Sila rujuk soalan 13. Pernahkah di dalam urusniaga kamu ada berlaku satu kesilapan mengenai chassis number seperti di dalam tindakan ini?
>
> (J:) Tidak pernah.
>
> (S:) Dalam kes ini sekarang terdapat 2 kesilapan. Satu kepada WLN 1274 dan WLD 9918. Jadi saya cadangkan bahawa penyataan En. Syed pada hari ini adalah tidak benar.
>
> (J:) Saya rasa saya tak pernah. Saya berpandukan pada sini. Tak pernah saya buat lagi silap silap kereta. Tak pernah.
>
> (S:) Tak setuju?
>
> (J:) Ya.
>
> …
>
> (PKW1:) Di kunci pun ada tag chassis number. Selalunya tak pernah silap.
>
> **Mahkamah:** Tapi hakikatnya ialah pembeli Plaintif di sini telah mendapati keretanya mempunyai chassis number yang berlainan.
>
> Bagaimanakah perkara ini boleh berlaku? Dari segi logiknya, kalau apa yang disebut Encik betul, Plainitf lah yang tukar kereta.
>
> (PKW1:) Dia boleh jadi macam-macam. Kita pun tak tahu apa yang jadi selepas 7 tahun. Pasal benda yang jadi ni pun tak kembali pada saya.

EVENTS AFTER JULY 2009

[15] According to the plaintiff, not long after the events mentioned above, she was approached by a representative from Naza who explained to her the problem; it appeared that the number plate and chassis number of her vehicle had been changed with that of another vehicle, namely WLD 9918. It also appeared that Naza on its part wrote to JPJ on 14 July 2009 and 27 July 2010 in its attempt to resolve the problem. JPJ replied to Naza by letter dated 25 August 2010 stating that Naza's application had been rejected by JPJ.

[16] The relevant letter from JPJ appears on p 43 of the common bundle of documents, marked as exh D23. This letter, dated 25 August 2010, and addressed to Naza Kia Sdn Bhd, states:

> Tuan
>
> RAYUAN MEMINDA NOMBOR CASIS DAN NOMBOR ENJIN KENDERAAN
>
> 1. NOMBOR PENDAFTARAN: WLN 1274

NAMA PEMILIK: SITI SALMA BINTI YUSOFF

2. NOMBOR PENDAFTARAN: WLD 9918

NAMA PEMILIK: MUHAMAD DIMYATI BIN KHALID

Dengan hormatnya saya diarah merujuk surat tuan …

2. Adalah dimaklumkan bahawa permohonan tuan telah dibawa kepada pertimbangan pihak pengurusan Jabatan. Dukacita dimaklumkan bahawa permohonan tersebut tidak dapat dipertimbangkan sehingga kenderaan WLD 9918 dijumpai dan menjalani pemeriksaan pengesahan identiti.

3. Sehubungan dengan itu, Bahagian ini memohon agar pihak tuan berusaha untuk mengesan kenderaan WLD 9918 bagi tujuan pengesahan identiti kenderaan sebelum pertimbangan dibuat …

[17] Thereafter, the plaintiff did not receive any further news from any of the parties in regard to attempts to resolve the matter.

[18] In view of the lack of an action to resolve the matter, the plaintiff then sought legal advice and thereafter instructed her counsel to send letters of demand to the defendant (on 30 November 2010 and 10 March 2011), to demand that the defendant take back the motor vehicle and pay her the damages amounting to RM126,211.46 which was the total amount paid by her in relation to the initial deposit and the monthly instalments already paid by her from 19 March 2004–9 November 2010, inclusive of all road taxes and insurance premia for the vehicle, within seven days. Additionally, she demanded the payment of RM200,000 as damages for defamation arising from the wrongful repossession and negligence of the defendant. These letters appear from pp 29–33 of bundle 'B' (the common bundle of documents), and have been marked as exhs P4–P5.

[19] The claim is essentially founded on s 7(1) of the Hire Purchase Act 1967, as well as s 57(2) of the Contracts Act 1950. Under s 7(1)(b) of the HP Act, it is an implied *condition* on the part of the owner that he shall have the right to sell the goods at the time when property is to pass. Section 57(2) concerns a contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, becomes unlawful. The contract therefore becomes void when the act becomes impossible or unlawful. Counsel for the plaintiff refers in particular to the High Court decision in *Affin-ACF Finance Bhd (formerly known as Asia Commercial Finance (M) Bhd) v Phang Ngan Heong (t/a Syarikat Kereta Kwong Yue)* [2010] 7 MLJ 561, and the passage reading:

> The passing of ownership at the time of the sale alone is insufficient. The ownership must continue to remain with the plaintiff for there to be meaningful passing of ownership. There had been a total failure of consideration as the very identity of the property allegedly sold was questionable.

[20] Other authorities referred to include *AmFinance Bhd v Europemas Automobile Sdn Bhd & Another* (unreported; Civil Appeal No MT(2) 12B-71 of 2010) and *Public Bank Bhd v Malayan Banking Bhd & Another* (Civil Appeal No as 12–02 of 2002). In the *AmFinance Bhd* case for example, the learned judicial commissioner held: 'It is trite law that the mere transfer of the vehicle registration in the name of the transferee did not have the effect of passing a good title to the transferee if the vehicle itself is defective … Failure by the vendor to ensure this will render the contract void under s 7… and/or s 57(2) Contracts Act 1954 for total failure of consideration …'

[21] In the conduct of this case, the position adopted by the plaintiff appears therefore to be that there is an issue of a defective vehicle; the defendant as owner under the hire purchase agreement did not have ownership of the vehicle with the particulars in the hire purchase agreement, such that what was 'hired' to the plaintiff was a different vehicle.

[22] The defendant responded through its solicitors by letter dated 14 December 2010 by which it stated that it was the third party's responsibility to ensure there were no discrepancies in the registration of the said vehicle, and further the plaintiff's claim was premature because the alleged effect was curable, the defendant being able and capable of passing a good title to the plaintiff upon full settlement of the hire purchase loan.

[23] The defendant then raised the issue of default in repayment of the hire purchase instalments, and again through its solicitors issued the letter of demand on 17 February 2011 requiring the plaintiff to pay the total outstanding sum of RM3,959.69 as at 17 February 2011. A Fourth Schedule Notice under s 16 of the Hire Purchase Act 1967 ie 'Notice of Intention to Repossess' was also sent to the plaintiff demanding that the plaintiff pay RM2,627.12 on or before 4 February 2011.

[24] As seen earlier, the plaintiff responded on 10 March 2011, and again demanded the refund of all monies paid under the hire purchase agreement as well as damages for defamation. The plaintiff has also made plain to the defendant that it can repossess the vehicle, but the evidence suggests the defendant has failed to act under the Fourth Schedule Notice although requested to do so by the plaintiff. It seems obvious that the wrong chassis number posts an obstacle even to the defendant.

[25] At this juncture, the parties seemed to have engaged in a strategy of 'passing the blame' and who would 'blink first'. The defendant maintains the third party is to blame for the error in the chassis number; the third-party however maintains it has followed its own standard operating procedure and therefore it is the plaintiff who is to be blamed for not checking the chassis

number upon taking delivery; the plaintiff blames the defendant for not being able to pass the ownership in the motor vehicle since the vehicle let on hire purchase is different in fact. The plaintiff refuses to pay the defendant because of the alleged breach of condition under s 7(1)(b) of the Hire Purchase Act 1967. The defendant demands the plaintiff pay the remaining three monthly instalments, but having issued a Fourth Schedule Notice, is reluctant to repossess the vehicle because the vehicle described in the hire purchase agreement is not the very same vehicle in the possession of the plaintiff. The plaintiff feeling aggrieved by the actions of the defendant, has even invited the defendant to repossess the vehicle, but this offer has not been taken up for obvious reasons.

MEETING WITH PUTRAJAYA JPJ ON 9 NOVEMBER 2011

[26] Nevertheless, it must be mentioned that it is to the defendant's credit that it has continued to try to resolve this issue through the JPJ. All parties have had a meeting with the Ketua Penolong Pengarah Bahagian Perlesenan JPJ at Putrajaya on 9 November 2011. JPJ on its part has given the parties two alternatives in trying to resolve this issue, namely (1) to bring the other vehicle bearing Registration No WLD 9918 to JPJ for verification, or (2) for the parties to procure an order of the court directing it to correct the error in the chassis number of the plaintiff's Naza Ria as recorded in the vehicle registration card. Apparently, if this court should issue the order, the error could be corrected in just half an hour! See the testimony of Ahmad Humaizi bin Awang (WPK4) who is the Ketua Unit Rekod, Bahagian Pendaftaran JPJ KL, at pp 200–201 of the notes of evidence (during examination-in-chief):

(S:) This letter was signed by Puan Norlizawati, who attended the meeting. So di sini saya boleh mengatakan bahawa jika kehadiran satu kereta, pihak JPJ boleh meminda dengan kehadiran geran yang asal yang masih terdapat di bank? Sebab sepatutnya kalau kita nak buat pindaan, geran asal perlu dihadapkan. Boleh dibuat pembetulannya ke tidak?

(J:) Untuk pindaaan ini, kelulusan perlu dibuat di bahagian perlesenan, Putrajaya dulu.

(S:) Tapi boleh diperbetulkan?

(J:) Jika dapat kelulusan, boleh diperbetulkan.

(S:) En Humaizi ada dimaklumkan pada 29.11.2004 satu mesyuarat telah diadakan dengan Puan Norlizawati.

(J:) Ya

(S:) *Di mana kami diberitahu bahawa dengan perintah mahkamah satu kelulusan dapat dibenarkan untuk pindaan tersebut dijalankan ke atas kereta WLN 1274. Adakah benar?*

(J:) *Benar.*

(S:) Dan selalunya kalau pindaan tersebut, dalam masa berapa hari ke berapa minggu?

(J:) *Seperti yang saya katakan tadi, jika dapat kelulusan Bahagian Perlesenan Kenderaan, Putrajaya. pihak kami di JPJ Kuala Lumpur tiada masalah untuk buat pindaan lah.*

(S:) *Dalam sehari?*

(J:) *Boleh*

(S:) *Dalam setengah jam? Kalau bawa perintah ini boleh dibuat?*

(J:) *Boleh*

(S:) Dapat dibuat?

(J:) Dapat

EVALUATION OF THE EVIDENCE AND APPLICABLE LAW

[27] Having considered the submissions of the parties and evaluating the evidence and the law, and with the benefit of the further submissions and further clarifications on the jurisdiction of this court in relation to parties not before this court, and in relation to whether the defendant has complied with the O 78 of the Rules of the High Court with reference to her claim to damages for defamation, I find the claim of the plaintiff not proven. This is particularly so in relation to a claim to damages for defamation ie the claim for RM200,000 damages for defamation.

DAMAGES FOR DEFAMATION/NEGLIGENCE

[28] The claim to damages for defamation is linked with the claim for negligence. On the pleadings, however, the essence of the claim is still defamation, more exactly slander. That the plaintiff's claim is based on slander has been clarified by counsel for the plaintiff during the further submission.

[29] The pleaded case appears in paras 23–27. Being a claim for slander, the plaintiff must comply with the O 78, rr 2–3, ie she must provide sufficient particulars of the alleged defamation and the publication of the alleged defamatory statement. As for the clarification by counsel for the plaintiff in his further submission, and it is also evident from the pleadings, the plaintiffs claim in this respect is based on 'conduct' on the defendant's part. As pleaded in para 23, *'Plaintif yang merupakan pegawai perubatan yang disegani dan dihormati telah merasa tertekan dan malu dengan tindakan agen-agen Defendan menarik balik kenderaan tersebut sehingga menjejaskan kesihatan dan pekerjaannnya juga dengan tindakan-tindakan agen-agen Defendan menarik balik kenderaan tersebut … juga menuntut gantirugi sebanyak RM200,000.00 sebagai pampasan kerana malu dan fitnah serta kecuaian yang dilakukan …'*

[30] The only particulars in amplification of this plea are contained in paras 24–25. Paragraph 24 adds little by way of the necessary particulars under O 78. Likewise, the averments in para 25, aside from the bare averments that *'kejadian tersebut … berlaku di depan rumah plaintif telah merendahkan dan menjejaskan plaintif di dalam jawatannya dan profesionnya dan telah menjatuhkan Plaintif di dalam kedudukan dan taraf sosialnya yang menggambarkan bahawa beliau seorang yang tidak mampu dan tidak membayar ansuran bulanan pinjaman kenderaan tersebut …'*

[31] There is also little by way of actual evidence to prove the allegations in para 25, with the only evidence being provided only by the plaintiff and her husband (DW1 and DW2). The gist of the plaintiff's claim is slander by conduct; the pleaded case fails in this regard.

[32] Although there is no firm authority on the issue whether there can be slander only by conduct, it is incumbent on the plaintiff to provide full particulars of claim and comply with O 78. On the facts of this case, it would appear that the plaintiff's claim in this regard is based not purely on conduct but rather a combination of verbal statements made by the alleged agents of the defendant and their conduct.

THE MAIN CLAIM FOR A DECLARATION OF INVALIDITY OF THE HIRE PURCHASE AGREEMENT

[33] In relation to the plaintiff's main claim for a declaration that the hire purchase agreement dated 13 February 2004 is null and void in law because of the defendant's failure to pass a good title to the Vehicle No WLN 1274, and that the defendant repay the plaintiff the sum of RM126,211.46 with interest at 8%pa from the date of judgement until date of full satisfaction, I also find the plaintiff's case unsubstantiated, and if allowed, will in fact result in unjust enrichment to the plaintiff.

[34] The facts of this dispute, as stated at the outset, are somewhat unfortunate; the issue is one of a wrong recording of the chassis number. Vehicle WLN 1274's chassis No is 4780; the chassis No as recorded in the Registration Card is 4769, which belongs to another Vehicle No WLD 9918 (as earlier noted above, belonging to one Dimyati). Both vehicles are of the same make ie Naza Ria.

[35] The error in the registration card, on the evidence, was only discovered when the mysterious character named 'Shamsul', who purported to act for Dimyati, appeared at her home to inform her of the mistake. This incident occurred on 10 March 2009; the hire purchase agreement is dated 13 February 2004.

[36] It was at this juncture that the plaintiff realised the error when her husband physically checked the engine.

[37] How and when the error occurred, and who should be held responsible for the error, are questions which, on the evidence before this court, cannot be satisfactorily resolved. It would appear on the probabilities that this error in recording is the result of human error. It is clear that both the plaintiff and the defendant cannot be blamed. It will be simply too far-fetched to suggest that the defendant somehow or rather caused the falsification in the registration so as to allow her some eight years later to claim for a full refund because the defendant as 'owner' in the hire purchase transaction cannot pass a good title under the hire purchase agreement.

[38] I agree with the position taken by the defendant that this is not the case of the defendant being conclusively proven not being able to pass a good title. Under s 7(1)(b) of the Hire Purchase Act, the ability to pass a good title must be decided at the time when the plaintiff has paid all sums due under the hire purchase agreement (*Public Finance Bhd v Ehwan bin Saring* [1996] 1 MLJ 331).

[39] Counsel for the defendant has also referred to the High Court decision in *Lee Chuie Siang v Public Finance Bhd* [2006] 5 MLJ 651; [2006] 5 CLJ 652 in further support of his argument. It was held in *Lee Chuie Siang* that the plaintiff's exercise of the option to purchase the car was upon the plaintiff's fulfilment of all the conditions precedent in the hire purchase agreement. This will necessarily imply the obligation to pay all instalments due before the hirer can exercise the option to purchase.

[40] Counsel for the plaintiff has also referred to the very same case of *Public Finance Bhd v Ehwan bin Saring*, in support of the plaintiff's claim that on the facts of this instant case there has been a total failure of consideration under s 57(2) of the Contracts Act. In *Ehwan bin Saring*, the hirer succeeded in establishing his claim for a refund of the sum paid by him to the finance company. On the facts of *Ehwan bin Saring*, the relevant hire purchase agreement was entered into on 27 March 1991, but the vehicle was seized by customs on 8 May 1991 for an alleged offence under s 135(1)(d) of the Customs Act 1967. The relevant vehicle was suspected to have been stolen. This was obviously a case where the owner did not have a good title when he entered into the hire purchase agreement. The High Court in that case applied s 7(4) of the Hire Purchase Act as preserving the implied condition at common law whereby the owner had to have a good title when he entered into the hire purchase agreement, and not when the final payment was made. Compare the case of *Lee Chuie Siang*, where the facts indicate the owner had a good title to pass when the hire purchase agreement was entered into, but the car was

subsequently tempered (not through any wrongdoing by the owner). The facts also show the hirer had been using the car for almost three years and had paid the relevant instalments. The problem surfaced arising from an accident which resulted in structural changes to the car where the front portion had been welded together and rejoined from two dissected parts. The chassis number had then also been tempered with. When the hirer applied for a replacement registration card (the original having been lost), the RTD refused to so issue.

[41] Counsel for the defendant quotes the following passages in the judgment:

> On the facts, it is plain that upon execution of the agreement on 1 March 1997 and subsequently until 12 January 2000, the defendant had a good title to pass and has indeed passed the title to the plaintiff by having the car registered in the name of the plaintiff who during this entire period had been using the car without any legal impediment whatsoever. In my view, the defendant could not be attributed with any responsibility for the plaintiff's subsequent conduct and actions consequent upon the third accident which brought about the aforesaid structural changes to the car. Indeed, had the car not met with the third accident, its original merchantable quality would not have been an issue and so there could have been no doubt that the defendant would have been able to pass a good title to the plaintiff.
>
> …
>
> It was asserted for the plaintiff that the defendant was in breach of cl 14 of the agreement as the plaintiff was unable to exercise the option to purchase the car which is now non-registrable and non-transferable …
>
> Failure of Consideration
>
> It was stressed for the plaintiff that the non-registration of the car on 12 January 2000 and its consequential unusability constituted a failure of consideration, relying on ss 57(2) and 66 of the Contracts Act 1950.
>
> For the avoidance of doubt, s 57(2) of the Contracts Act 1950 is intended to render a contract void, when a contract to do an act subsequently becomes impossible or unlawful.
>
> …
>
> Section 66 of the same Act provides for the obligation of a person who has received an advantage under a void agreement to make restitution …
>
> In relation to the failure of consideration in a hire purchase agreement, I am not unmindful of the English Court of Appeal judgment in *Yeoman Credit Ltd v Apps* [1962] 2 QB 508 (CA). There, by a hire purchase agreement, the hire-purchase company hired a car to the hirer, at an initial payment to be followed by 30 monthly instalments. The defendant effected the initial payment. The car was in an unusuable condition and required expenditure to put it to a reasonable condition. The hirer complained to the hire-purchase company about the car's condition, but kept the car and paid only three subsequent instalments. The company determined the hiring, removed the car from the hirer's house and brought proceedings against

A the hirer for arrears of instalments and damages. The hirer counterclaimed for £170 paid under the agreement, alleging failure of consideration. The county court judge found for the hirer. On appeal, Holroyd Pearce LJ disagreed and held that the hirer's use coupled with possession and continuance of the hire purchase agreement debarred the hirer from saying that there was a total failure of consideration.

B The facts in the instant appeal bear a striking similarity in that the plaintiff has been in possession and has been using the car for almost three years during which she has effected payments for the relevant instalments, until its unusability was brought about by the third accident which resulted in the above structural changes to the car. Hence, as in *Yeoman Credit*, I am of the view that the plaintiff is unable to rely on the doctrine of failure of consideration.

C

(at pp 658–661 of the report, per Low Hop Bing J, as His Lordship then was).

[42] The claim by the hirer in *Lee Chuie Siang* failed, in part because in the view of the court the hirer had had the use of the vehicles for a number of years and the structural changes were the result of the third accident and not the finance company's doing.

D

[43] On the facts of the instant case, however, the court is not, with respect faced with a similar problem. There is in reality no issue in regard to merchantable quality of the vehicle; at the time when the hire purchase agreement was entered into and presently, vehicle WLN 1274 remains the same. We are not here concerned with a stolen or tempered vehicle, but a case of an error in recording of the correct chassis number. No one has tempered with the chassis number. To this extent there cannot be said there has been a total failure in consideration. The claim by the plaintiff for a full refund is thus not strictly supported in law.

E

F

[44] Here, however, the plaintiff has dutifully paid her monthly instalments under the hire purchase agreement except the last three monthly instalments amounting to RM3,959.34, which the plaintiff has refused to settle after attempts to correct the error at the JPJ proved unsuccessful. The plaintiff has placed the responsibility for effecting this correction on the defendant.

G

H **[45]** I am satisfied on the evidence that sufficient effort has been made by the defendant and Naza Kia to persuade the JPJ to correct the error in the registration card, but unfortunately JPJ is now insisting that both vehicles have to be brought to JPJ for inspection before the registration particulars and the registration card can be corrected by it. It is now abundantly clear on the evidence the hirer of WLD 9918 has not only defaulted on the instalments but has also absconded with the vehicle. The original registration card for vehicle WLD 9918 is however available and in the safekeeping of the defendant.

I

[46] The position taken by JPJ, with respect, is manifestly unreasonable.

There is no requirement under the Road Traffic Act for such an onerous and near-impossible imposition to be placed on the immediate parties here. The stand taken by the JPJ is unnecessarily onerous and unjust to these immediate parties. What the Act requires is 'proof', not the rigid insistence on the two vehicles having to be brought to the JPJ for inspection. As indicated earlier, the original registration card for Vehicle No WLD 9918 is available, and it will be but a simple expedient upon satisfactory proof of the error, for JPJ to effect the necessary correction to the registration card of the plaintiff's vehicle. I fully agree with the contention of the defendant that s 12(4) of the Road Transport Act 1987 ('RTA') confers sufficient powers on JPJ as the registering authority to do so. Under this provision, as the 'licensed registrar' and upon receipt of 'information' or 'proof' that any information in respect of a motor vehicle is 'incorrect' or 'misleading', JPJ 'may make such amendments in the register and in the registration certificate' as it may consider necessary.

[47] JPJ is conferred under the statute with this express discretion and it is the express duty of the registered owner of the motor vehicle to forthwith inform the JPJ in writing of any circumstances affecting the accuracy of any entry in the register. The parties have informed JPJ of the inaccuracy and there is the report from PUSPAKOM to also establish this fact. In these circumstances, JPJ will be duty bound to exercise its discretion properly and in accordance with law.

[48] I have also noted that some concessions appear in the evidence of TPW5, Puan Norlizawati bt Samad, the Ketua Penolong Pengarah, Bahagian Perlesenan Kenderaan, Putra Jaya. See the notes of proceedings at pp 241– 242:

(S:) Puan Norliza, setuju dengan saya bahawa kecacatan yang terdapat pada buku pendaftaran Puan Siti Salma dalam kes ini, sebenarnya satu kecacatan boleh diperbetulkan?

(J:) Setuju.

En Ganesan: That's all My Lord.

<u>Pemeriksaan Semula</u>

(S:) Puan, saya nak tanya, tindakan JPJ, bila individu telah maklumkan, dalam kes ini Siti Salma telah memaklumkan bahawa keretanya didapati kesilapan nombor engine, tidakkah satu tanggungjawab untuk JPJ membuat pengesahan terhadap kereta lagi satu? Atau black mark ke atau apa-apa sesuatu tindakan supaya orang yang mengadakan kereta sekarang, Siti Salma, she loses out, you know. She cannot renew her roadtax, license got problem. Tidakkah JPJ ada satu tanggungjawab?

(J:) Aduan dibuat oleh pihak Naza bukan pihak Siti Salma. Dan aduan juga melibatkan kedua-dua kenderaan dan perbincangan telah dilakukan

dengan JPJ dan Naza, paling tidak 2 kali untuk kes ini. Dan Naza berjanji untuk mendapatkan kedua-dua kenderaan supaya kami boleh buat tindakan seterusnya.

(S:) Saya percaya Naza telah membuat banyak perbincangan dan Naza juga telah memaklumkan kepada pihak bank berkenaan kereta yang lagi satu. Tapi, tanggungjawab Naza adalah untuk memproseskan supaya kesilapan tersebut dapat diselesaikan melalui JPJ. Tapi untuk mendapatkan kenderaan, saya percaya boleh tak saya mengatakan bahawa atas tanggungjawab JPJ untuk mendapatkan maklumat tersebut.

(J:) Ya. Saya setuju

[49] It is evident that in such circumstances as this, JPJ has all the necessary powers under ss 61 and 62 of the RTA to direct Dimyati to produce the other vehicle for examination and to even search and seize the other vehicle. It will be thus patently unfair to expect the immediate party to produce the other vehicle in these circumstances.

[50] On the evidence and the facts as established on the evidence, I would have no hesitation to issue an order to compel the JPJ to act in accordance with law, but unfortunately JPJ is not presently a party in these proceedings, and as such this court will be exceeding its jurisdiction should JPJ be ordered to do so in this instant suit. The parties may want to consider instituting a separate action hereafter naming JPJ as a party for this purpose.

[51] This dispute will not come to a satisfactory resolution without the necessary correction to the register and the registration card.

[52] Based on the established facts on the evidence and the law, I am constrained to dismiss the plaintiff's claim for the declaration and the refund of the instalments paid and the interest pleaded, but in these unfortunate circumstances, I will not make any order as to costs against the plaintiff. Each party therefore is to bear its own costs.

[53] As for the remaining instalments to be paid, it will be only fair and equitable for this sum to be paid into a stakeholder's account pending the resolution of the matter with JPJ. Once the correction in the register and the registration card is completed, the sum can then be paid to the defendant and consequently the full ownership of the vehicle can be transferred to the plaintiff by cancelling the indorsement of claim by the defendant over the vehicle. I am not however making an express order in this regard and I leave it to the parties to discuss and come to some agreement on this, hopefully with the necessary good sense and goodwill.

[54] I hope counsel for the plaintiff and the defendant will take instructions on this and revert to this court accordingly.

[55] Although I have suggested that the parties institute a separate action against JPJ for this purpose, if the same result can be achieved voluntarily through the good effort of JPJ (now that the full facts have come to light), this will be the best solution to this peculiar and unfortunate dispute.

CONCLUSION

[56] The plaintiff's claim as pleaded in the statement of claim is dismissed. Each party is to bear its own costs.

Claim dismissed and each party ordered to bear their own costs.

Reported by Ashok Kumar